IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0067

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANIEL FITZGERALD BROOKS,

Defendant and Appellant.

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# APPELLANT'S REPLY BRIEF

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On Appeal from the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula,
The Honorable Ed McLean, District Judge, Presiding

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## OTHER AUTHORITIES

Montana Code Annotated:

## ARGUMENT

### I. The strict interpretations of the PFO statute does not trump the Constitutional protections against double jeopardy.

The State argues that Mr. Brooks satisfies the statutory requirements of the persistent felony offender ("PFO") sentence enhancement; and therefore, the district court properly imposed the PFO sentence enhancement. The State also relies on this Court's prior acceptance of sentencing defendants as a felony driving under the influence ("Felony DUI") under § 61-8-731, MCA (2009) and under the PFO statute. These arguments are inapplicable here.

Simply because Mr. Brooks satisfies the PFO statutory requirements does not render its application to Mr. Brooks constitutionally valid. The State relies upon *State v. Shults* quoting "[a] sentence as an habitual criminal is not viewed as a new jeopardy." *Shults*, 2006 MT 100, ¶ 26, 332 Mont. 130, 136 P.3d 507 (citing cases). In *Shults*, the defendant was charged with felony escape and theft. *Id*. ¶ 10. The State also pursued a PFO sentence enhancement based upon a prior conviction of issuing a bad check. *Id*. The District Court sentenced the defendant as a PFO on both charges. *Id*. ¶ 11. Shults argued that imposing a PFO sentence enhancement violates the double jeopardy protections, but this Court concluded "sentenc[ing] as an habitual criminal is not to be viewed as a new jeopardy." *Id*. ¶ 26.

This matter is distinguishable from *Shults*. Neither the *Shults* Court nor the counsel discussed or relied upon *State v. Guillaume*, or similar logic to *Guillaume*. The Court did not analyze whether the application of the PFO enhancement and the underlying felony both resulted because of prior convictions. This Court is not bound by decisions such as *Shults* because those decisions did not address the same legal question presented here.

Additionally, the arguments applicable here did not apply in *Shults* because the felony offenses to which the District Court sentenced Shults did not become felonies based upon prior convictions—the crimes were defined as felonies because of the acts committed. *Id*. ¶¶ 10, 11. Whereas here, the underlying offense—a DUI—only became a felony because of Mr. Brooks' prior acts, not the acts committed during the incident in question. Mr. Brooks is subjected to two punishments—the punishment of raising the DUI from a misdemeanor to a felony and a new jeopardy with the PFO enhancement—both because of his prior convictions. Therefore, the conclusion that "sentenc[ing] as an habitual criminal is not to be viewed as a new jeopardy" does not apply to this matter.

While this Court has previously discussed sentencing as a Felony DUI and PFO, those cases have not dealt with the issue presented here. In *State v. Damon*, this Court concluded that "§ 46-18-502, MCA, makes no distinction between or among the types of felonies to which it applies, and it does not exclude offenders

convicted of DUI violations." *State v. Damon*, 2005 MT 218, ¶ 36, 328 Mont. 276, 119 P.3d 1194. In *State v. Yorek*, this Court also determined that a district court has the statutory authority to sentence a defendant convicted of Felony DUI as a PFO. *State v. Yorek*, 2002 MT 74, ¶ 18, 309 Mont. 238, 45 P.3d 872; *see also State v. Pettijohn*, 2002 MT 75, ¶¶ 13-14, 309 Mont. 244, 45 P.3d 870 (concluding "based on our decision in *State v. Yorek*, that the District Court possessed statutory authority, and therefore had jurisdiction, to designate and sentence Pettijohn as a [PFO]" upon being sentenced for Felony DUI). However, again, the *Damon*, *Yorek*, and *Pettijohn* Courts did not address whether applying both the Felony DUI and PFO enhancements violates the Constitutional protections against double jeopardy because both enhancements rely on the prior conviction element. Because these cases do not address the arguments presented here, the Court's acceptance in *Damon*, *Yorek*, and *Pettijohn* of the application of the PFO sentencing enhancement to Felony DUI defendants does not apply to this matter.

It is irrelevant that this Court previously has strictly applied the PFO enhancement in Felony DUI matters, only questioning whether the defendant satisfied the statutory requirements and whether an exception applied. In *State v. Guillaume*, the strict statutory language of the weapons enhancement applied to the *Guillaume* defendant. *See Guillaume*, 1999 MT 29, ¶ 9, 293 Mont. 224, 975 P.2d 312. Similar to the PFO enhancement here, generally the weapons enhancement is

a sentencing factor that does not violate double jeopardy. *Id*. ¶ 10. However, the *Guillaume* Court appropriately looked beyond the strict statutory language and applied the greater double jeopardy protections of the Montana Constitution to determine that the weapons enhancement as applied to Guillaume violated his Constitutional protections against double jeopardy. *Id*. ¶¶ 13, 16, 18.

The same logic applies here. Generally, the PFO enhancement is Constitutional. However, because the Felony DUI enhancement raises the DUI charge from a misdemeanor to a felony based solely on prior convictions, applying the PFO enhancement also because of prior convictions violates Mr. Brooks' Constitutional right against double jeopardy, as applied. To determine otherwise, would "in effect strip double jeopardy of all meaning." *Id*. ¶ 22.

In sum, the case law relied upon by the State is inapplicable to this matter. Sentencing under a Felony DUI per § 61-8-731, MCA and a PFO per § 46-18-502, MCA, both impose sentence enhancements based on prior convictions. The Constitutional protections against double jeopardy mandate that the District Court could not impose both sentence enhancements of the Felony DUI and the PFO because it punishes the defendant twice for his prior convictions. For these reasons, Mr. Brooks requests that this Court reverse the sentence of the District Court and sentence Mr. Brooks solely as a Felony DUI.

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## II. In the alternative, Mr. Brooks did challenge the persistent felony offender prior to sentencing, which mandated that the District Court hold a "hearing to determining if the allegations in the notice are true."

If the defendant objects to the allegations contained in the notice to seek PFO designation, "the judge *shall* conduct a hearing to determine if the allegations in the notice are true." § 46-13-108(3), MCA (emphasis added). This is an absolute mandate. Given the great difference between the sentences imposed under a Felony DUI and that under a PFO, it is important for a district court to strictly adhere to this mandate prior to sentencing, regardless of when and how the objection is presented to the district court. *Compare* § 61-8-731(1), MCA (sentencing a Felony DUI to the Department of Corrections in a residential alcohol treatment program for 13 months, after the successful completion of the residential alcohol treatment program "the remainder of the 13 month sentence must be served on probation;" and "a term of not more than 5 years, all of which must be suspended, to run consecutively to the term imposed under subsection (1)(a)" in the Department of Corrections or Montana State Prison) *with* § 46-18-502(1) (sentencing a PFO to the "state prison for a term not less than 5 years or more than 100 years or shall be fined an amount not to exceed $50,000.").

Furthermore, in addition to the guidance that the pleadings of *pro se* litigants are to be liberally construed, the "law respects form less than substance." § 1-3-219, MCA; *see also Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 164

(1984). In consideration of these legal maxims, it is clear that the substance of Mr. Brooks' Memorandum in Support of Resentencing Recommendation, which he submitted prior to his second sentencing, was that he objected to the prior felony conviction. *See State v. Brooks*, Cause No. DC-07-377, Memorandum in Support of Resentencing Recommendation at 2 (Mont. 4th Jud. Dist. Ct. Dec. 10, 2009) (hereinafter "Memorandum") (Appendix A).

The PFO enhancement applies only at sentencing. This Court has explained that: "Persistent felony offender hearings are part of the sentencing proceeding. Policy for this is sound, as the court wants to examine complete historical data and potential of the defendant before it pronounces sentence." *See State v. LaMere*, 202 Mont. 313, 321, 658 P.2d 376, 380 (1983). Therefore, the Court needs to address the validity of the PFO notice prior to applying the PFO enhancement at sentencing. Mr. Brooks satisfied his obligation to challenge the PFO notice in his Memorandum in Support of Resentencing Recommendation filed prior to sentencing. *See* Memorandum at 2. There are no legal time constraints when the objection to the PFO notice must be made. However, given that the PFO enhancement only applies at sentencing, logic mandates as long as the objection is made prior to sentencing, a timely objection has been made.

The State argues that Mr. Brooks waived any challenges he could have to the prior felony conviction because he pled guilty to that prior conviction. This

argument assumes facts not in the record. The State presumes that the Constitutional challenge was prior to his change of plea. However, it may have occurred anytime during the proceedings. Without conducting the necessary hearing on the prior felony, all the Court and counsel can do is speculate. This exact scenario is why § 46-13-108(3), MCA requires the District Court to conduct a hearing to determine the truth of the PFO allegations.

The State argues that *State v. Violette*, 2009 MT 19, ¶ 16, 349 Mont. 81, 201 P.3d 804, dictates that Mr. Brooks waived all challenges to the prior felony conviction because he plead guilty to that prior conviction. However, *Violette* also qualifies this waiver "upon voluntarily and knowingly entering a guilty plea," explaining that "[a]fter the plea, the defendant 'may only attack the voluntary and intelligent character of his plea.'" *Id*. This is an important qualification because Mr. Brooks' challenges to the prior conviction could be the "voluntary and intelligent character of his plea," but this fact is unknown because the District Court did not conduct a hearing on the validity of the prior conviction.

Given the gravity of enhancing a sentence due to a defendant's designation as a PFO, it is of the utmost importance to determine that the PFO enhancement is properly applied. The hearing contemplated by § 46-13-108(3), MCA is precisely the mechanism to ensure proper application of the PFO enhancement.

Thus, in the event that this Court does not reverse the sentence in this matter due to the violations of Mr. Brooks' Constitutional double jeopardy rights, this Court should reverse this sentence because of the District Court's failure to conduct a hearing on the validity of the PFO notice, and should remand this matter to the District Court to conduct a hearing to determine the truth of the allegations contained in the PFO notice.

## CONCLUSION

For the above stated reasons, and those outlined in Mr. Brooks' opening brief, Daniel Fitzgerald Brooks respectfully requests that this Court reverse the sentence imposed by the District Court and instruct the District Court to sentence Mr. Brooks only under the Felony DUI sentencing statute.

In the alternative, Mr. Brooks requests that this Court reverse the sentence of the District Court and order the District Court to conduct a hearing to determine the truth of the allegations contained in the PFO notice.

Respectfully submitted this 6th day of July, 2010.

ANGEL, COIL & BARTLETT

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HILLARY PRUGH CARLS
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## CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the above and foregoing were duly served upon each of the following parties or their counsel, by first class mail, on the 6th day of July, 2010, addressed as follows:

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except; and the word count calculated by Microsoft Word 2008, is not more than 5,000 words excluding certificate of service and certificate of compliance.

Dated this 6th day of July, 2010.

ANGEL, COIL & BARTLETT

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